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No. 04-1264

IN THE

Supreme Court of the United States

BUCKEYE CHECK CASHING, INC.,

Petitioner,

v.

JOHN A. CARDEGNA AND DONNA REUTER,

Respondents.

On Writ of Certiorari
to the Supreme Court of Florida

BRIEF OF *AMICI CURIAE* FLORIDA BANKERS ASSOCIATION AND AMERICAN BANKERS ASSOCIATION IN SUPPORT OF PETITIONER

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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INTEREST OF *AMICI CURIAE*[1]

Amicus curiae Florida Bankers Association ("FBA") is a voluntary organization of financial institutions doing business in the State of Florida. FBA regularly represents the interests of its members before all branches of government and frequently appears as an *amicus curiae* in the state and federal courts, including, on several occasions, before this Court. The issue in this case is of particular importance to FBA and

[1] This brief is filed with the written consent of all parties. No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amici* or their counsel, make a monetary contribution to the preparation or submission of this brief.

its members because arbitration agreements are a significant way in which FBA members attempt to promote the efficient and inexpensive resolution of disputes. By undermining the application and enforceability of arbitration clauses, the decision below, if allowed to stand, will impose greater costs and greater uncertainty upon FBA's members.

Amicus curiae American Bankers Association ("ABA") is the principal national trade association of the banking industry in the United States. ABA has members in each of the fifty states and the District of Columbia. ABA member banks hold approximately 90% of the domestic assets of the banking industry in the United States. ABA frequently appears in litigation as a party or *amicus* where issues raised in a case are of widespread importance and concern to the industry. The issue in this case is of precisely such importance and concern to the banking industry because the decision below and others like it threaten to undermine the tremendous benefits of arbitration agreements used in the banking industry and to divert numerous disputes into the more expensive and less efficient court system.

SUMMARY OF ARGUMENT

1. The proper approach to assessing the making and validity of arbitration clauses is to treat them as separable or severable contracts that must be analyzed independently from the validity of the contracts with which they are associated. Both the language of the Federal Arbitration Act ("FAA"), 9 U.S.C. §§ 1, *et seq.*, and this Court's decision in *Prima Paint Corp.* v. *Flood & Conklin Manufacturing. Co.*, 388 U.S. 395 (1967), support such an independent analytical approach. The sole question for the courts is whether the parties have made a valid agreement to arbitrate, regardless whether the remainder of the parties' agreements are valid or enforceable. Numerous federal courts of appeals have correctly adopted a "doctrine of separability" to distinguish between claims that necessarily bear upon the validity of the arbitration agreement

and claims going to the validity of the substantive contract but that have no intrinsic effect on the arbitration agreement.

That analytical approach is the best and most efficient tool to help courts properly answer the question whether an arbitration agreement survives a claim that the underlying contract is void or voidable. Using such an approach, the claim below – that the contract is substantively void based on an alleged violation of usury laws – has no inherent bearing on the separate agreement to arbitrate and hence the claim should be heard by an arbitrator, not a court. The decision below, however, conflated the issue of underlying contractual validity and arbitration-agreement validity by holding that no part of a void agreement is severable. That holding is directly contrary to the federal rule that arbitration agreements are to be treated as separable contracts and hence should be reversed.

2. The expansive, efficient, and certain enforcement of arbitration agreements is of substantial importance to the banking and other industries and is a worthy goal long established and supported by Congress and this Court. Arbitration agreements are used extensively throughout the banking and other industries and the prospective adverse consequences of the decision below are significant and widespread. The particular issue in this case – whether claims of contract invalidity not independently applicable to the arbitration agreement are to be decided by the court or the arbitrator – likewise arises in connection with numerous contracts, based on many different claims of illegality. Shifting such a broad swath of claims into the courts and away from arbitration thus would severely undermine the goals of the FAA to the detriment of the banking industry, their customers, and all other contracting parties who benefit from the efficiency, expertise, and lower expenses of arbitration.

ARGUMENT

I. ARBITRATION CLAUSES MUST BE TREATED AS SEPARABLE OR SEVERABLE CONTRACTS, THE VALIDITY OF WHICH IS DETERMINED INDEPENDENTLY FROM THE SUBSTANTIVE VALIDITY OF THE UNDERLYING AGREEMENTS.

The question posed in this case is whether the alleged invalidity of a contract in general likewise invalidates an arbitration clause contained therein where the invalidity stems from some substantive defect in other parts of the contract that does not independently apply to the arbitration clause itself. That question is effectively answered by both the FAA and this Court's decision in *Prima Paint*, which treat an arbitration clause as a *separable* agreement not affected by alleged deficiencies that do not independently relate to the arbitration agreement itself. The Florida Supreme Court held otherwise and concluded pursuant to *state* law that an otherwise valid arbitration clause was not severable from the allegedly void terms of the underlying contract and hence was void by mere association. That holding was error and should be reversed.

As a matter of federal law, arbitration clauses are deemed to be separate and severable agreements from the underlying contracts in which they may appear. The basis for such separability can be found both in the statute and in this Court's cases. Section 2 of the FAA, for example, provides in relevant part that a "written *provision* in any * * * contract * * * to settle by arbitration a controversy thereafter arising out of such contract * * * *shall be valid*, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2 (emphasis added). The statute thus expressly distinguishes between a "provision" for arbitration and the "contract" in which it may be contained, and specifies the validity, etc., of such provision

without mention of or regard for the validity of the contract as a whole. Similar separation of the arbitration clause from the contract as a whole appears in other sections of the FAA as well. *See, e.g.*, 9 U.S.C. § 4 (providing for an order directing arbitration upon the court "being satisfied that the making of *the agreement for arbitration* * * * is not in issue," without regard for whether the making of any underlying contract in general is in issue) (emphasis added). By creating a distinct federal rule applicable only to the "provision" or "the agreement for arbitration," the statute necessarily creates a separation between consideration of the agreement as to forum and the substance of disputes to be resolved by that forum.

This Court in *Prima Paint* applied just such a separability analysis to reject a claim that alleged fraud in the inducement of the contract generally somehow undermined a non-fraudulently induced agreement to arbitrate issues arising out of that contract. After describing the split between the Second and First Circuits over whether an arbitration agreement's separability or severability was a matter of federal or state law, this Court concluded that "Congress has provided an explicit answer": The "making" of an agreement to arbitrate is to be analyzed independently from the underlying contract. 388 U.S. at 403. "If the claim is fraud in the inducement of the arbitration clause itself," a court may resolve it; but if the claim goes to "the contract in general," it is an issue for the arbitrator. *Id.* at 403-04. This Court reiterated such separate treatment by concluding that a court "may consider *only* issues relating to the making and performance of the agreement to arbitrate." *Id.* at 404 (emphasis added).

Numerous federal Courts of Appeals, both before and since *Prima Paint*, have correctly followed the federal-law requirement that agreements to arbitrate be analyzed independently from the underlying contract.

Perhaps the most illustrative early case comes from the Second Circuit and is the very case with which this Court sided in resolving the split that led to *Prima Paint*. In *Robert*

Lawrence Co. v. *Devonshire Fabrics, Inc.*, 271 F.2d 402 (CA2 1959), *cert. granted*, 362 U.S. 909, *dismissed under Rule 60*, 364 U.S. 801 (1960), the Second Circuit rejected a claim that fraud in the inducement of the contract generally would likewise undermine the associated arbitration clause that was not itself fraudulently induced. Relying on the terms of the statute, the Court explained:

> That the Arbitration Act envisages a distinction between the entire contract between the parties on the one hand and the arbitration clause of the contract on the other is plain on the face of the statute. Section 2 does not purport to affect the contract as a whole. On the contrary, it makes "valid, irrevocable, and enforceable" only a "written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction" * * *.

271 F.2d at 409-10.

That same distinction carries through to the grounds on which an agreement to arbitrate *can* be challenged. Under the exception in Section 2 of the FAA, a written provision or agreement to arbitrate is valid, irrevocable, and enforceable, "save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. Just as the basic validity described in Section 2 is limited to the arbitration agreement itself, so too is the exception:

> The agreement described in Section 2 is the arbitration "provision" or clause of the principal contract. If this arbitration clause was induced by fraud, there can be no arbitration; and if the party charging this fraud shows there is substance to his charge, there must be a judicial trial of that question before a stay can issue.

271 F.2d at 410-11.

Finally, the Second Circuit went on to observe that its treatment of "the agreement to arbitrate as a separable part of

the contract is based not only upon the clear wording of the text [of § 2 of the FAA] but is buttressed by several other pertinent considerations" including the historical treatment of arbitration clauses "as separable parts of the contract." *Id.* at 410 (citing cases). Such separability is further reinforced by the fact that "the mutual promises to arbitrate would form the *quid pro quo* of one another," *id.* at 411, which creates independent consideration for a bilateral agreement to arbitrate.[2] (Interestingly, many arbitration clauses, including the one in this case, are also supported by separate signatures as well. JA 36, 38, 40, 42.)

Following *Prima Paint* and *Robert Lawrence*, other Circuits have likewise adopted and applied the separability principle to preserve arbitration clauses in the face of alleged invalidity based on unrelated defects in other elements of the parties' substantive agreements. *See, e.g.*, *Jenkins* v. *First Am. Cash Advance of Ga., LLC*, 400 F.3d 868, 880-82 (CA11 2005) (applying *Prima Paint* rule to claim of substantive voidness based on Georgia statute); *Fazio* v. *Lehman Bros., Inc.*, 340 F.3d 386, 394-95 (CA6 2003) (focusing "on the validity of the arbitration clauses standing alone" in the face of claimed theft of funds allegedly voiding underlying brokerage account agreements); *Snowden* v. *Checkpoint Check Cashing*, 290 F.3d 631, 636-38 (CA4) (applying "severability doctrine" to reject challenge to arbitration based on alleged voidness due to claimed violation of state usury and licensing laws), *cert. denied*, 537 U.S. 1087 (2002); *Burden* v. *Check Into Cash of Ky., LLC*, 267 F.3d 483, 489-90 (CA6 2001) (same), *cert. denied*, 535 U.S. 970 (2002); *Harter* v. *Iowa Grain Co.*, 220 F.3d 544, 550 (CA7 2000) (applying *Prima Paint* to re-

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[2] That a bilateral agreement to arbitrate forms its own consideration helps explain why fraudulent inducement regarding other aspects of the contract – effectively a deficiency in consideration – has no inherent bearing on the agreement to arbitrate. A unilateral agreement to arbitrate, not supported by its own built-in consideration, would likely fare differently under the separability analysis.

ject challenge to arbitration based on underlying contract's alleged violation of Commodities Exchange Act); *3H & Assocs., Inc.* v. *Hanjin Eng'g & Constr. Co.*, No. 97-16751, 1998 WL 657722, at *2 (CA9 1998) (unpublished) (applying *Prima Paint* to reject challenge to arbitration based on claim that construction contract was void in requiring building code violations); *National R.R. Passenger Corp.* v. *Consolidated Rail Corp.*, 892 F.2d 1066, 1070 (CADC 1990) (rejecting challenge to arbitration based on alleged voidness of underlying agreement's inconsistency with public policy regarding safety); *Lawrence* v. *Comprehensive Bus. Servs. Co.*, 833 F.2d 1159, 1161-62 (CA5 1987) (applying *Prima Paint* to reject challenge to arbitration based on alleged voidness of underlying contract due to violation of Texas statute).[3]

Not only is the separability doctrine a correct reading of the FAA and this Court's precedents, it also is a clear and easily applied analytical approach to reviewing the "making" of arbitration agreements and thus fulfills the underlying purpose of the FAA to make the enforcement of arbitration agreements speedy and effective. *See infra*, Part II. Rather than get caught up in irrelevant, shifting, and often esoteric disputes over whether a challenge would render a contract void or voidable, or whether a challenge goes to the contract as a whole, the separability approach merely requires treating an arbitration provision as a discrete entity and asking whether the challenge still logically applies on its own terms. If the challenge *does* still apply then a court must resolve it,

[3] And, while not expressly addressing the issue here, this Court has implicitly applied the separability doctrine in holding that the alleged illegality of the underlying transaction does not negate an agreement to arbitrate disputes arising from that transaction. *See Shearson/American Express, Inc.* v. *McMahon*, 482 U.S. 220, 239-40 (1987) (arbitration not precluded by claims alleging criminal violations of Securities laws and RICO); *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 637 (1985) (arbitration not precluded by claims alleging violations of the antitrust laws).

regardless whether the outcome would be voidness or mere voidability and regardless whether the challenge would *also* affect the validity of the contract as a whole. But where the challenge has no inherent application to a separate arbitration agreement, it would be for the arbitrator to resolve if the challenge fell within the scope of the arbitration clause.

Separability analysis thus would make short and efficient work of deciding who should resolve the various challenges to arbitration. For example, a claim that a party never signed the agreement at all, or that his signature was forged, independently challenges the making of the arbitration agreement and would be a proper challenge to arbitration regardless of what the remainder of the contract said. *Opals on Ice Lingerie* v. *Body Lines, Inc.*, 320 F.3d 362, 370 (CA2 2003) (signature forged); *Chastain* v. *Robinson-Humphrey Co.*, 957 F.2d 851, 855 (CA11 1992) (party had not signed agreement at all). While such a claim would *also* challenge the validity of the contract as a whole, it is its independent effect on the agreement to arbitrate that matters and acts as a judicially cognizable deficiency even after severance of the arbitration agreement from the remainder of the contract. The point is not that a claim must apply *only* to the arbitration clause, but rather that it must apply *independently* to the arbitration clause.[4]

[4] This approach also would resolve the confusion of some courts that have questionably refused to consider challenges to arbitration clauses because such challenges were not *unique* to the arbitration clause but also applied to the remainder of the contract. *Compare Primerica Life Ins. Co.* v. *Brown*, 304 F.3d 469, 472 (CA5 2002) (dubiously refusing to consider a lack-of-mental-capacity defense to an arbitration agreement because it was also a defense to the entire agreement) *with Spahr* v. *Secco*, 330 F.3d 1266, 1273 (CA10 2003) (correctly holding that "mental capacity defense naturally goes to *both* the entire contract and the specific agreement to arbitrate" and thus was for the court do decide as it applied to the arbitration agreement) (emphasis in original). As explained, it is the *independant* application of a challenge to the arbitration clause that determines

Other likely examples of claims that would apply even to separable agreements to arbitrate include claims involving questions of authority on the part of a supposed agent, the issue of capacity of the signatory (as in the cases of children or incompetents), certain issues of offer and acceptance that might rebut the notion that the parties ever reached agreement in the first place, or even a possible failure of consideration if the agreement to arbitrate were unilateral rather than bilateral. *See, e.g.*, *Spahr* v. *Secco*, 330 F.3d 1266, 1273 (CA10 2003) (lack of mental capacity); *Sphere Drake Ins. Ltd.* v. *All Am. Ins. Co.*, 256 F.3d 587, 591 (CA7 2001) (agent lacked authority to sign); *Three Valleys Municipal Water Dist.* v. *E.F. Hutton & Co.*, 925 F.2d 1136, 1139-42 (CA9 1991) (agent lacked authority to sign); *see also Will-Drill Resources, Inc.* v. *Samson Resources Co.*, 352 F.3d 211, 219 (CA5 2003) (giving example of a failure of offer and acceptance meaning no agreement to arbitrate was ever formed).

A separate arbitration agreement, however, would *not* be subject to a claim of *usury* or other illegality unrelated to the arbitration clause itself. *See, e.g.*, *Fazio*, 340 F.3d at 394-95 (alleged RICO and securities laws violations); *Bess* v. *Check Express*, 294 F.3d 1298, 1304-06 (CA11 2002) (alleged usury and lack of licenses); *Harter*, 220 F.3d at 550 (alleged Commodities Exchange Act violation); *Lawrence*, 833 F.2d at 1161-62 (alleged violation of Texas statute). Where validity turns on some *substantive* defect in the terms or performance of the other parts of the contract, separating out the challenged portion of the contract would indeed leave a valid arbitration agreement. Where the arbitration clause is independently valid, but the remainder of the contract is in doubt, the validity of the rest of the contract can and must be resolved by the arbitrator.

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judicial cognizability, not its *exclusive* application to the arbitration clause.

Correctly understood and applied, the federal requirement of separability renders the Florida Supreme Court's void/voidable distinction wholly irrelevant. The issue is not the *effect* of the alleged defect in a contract, but rather whether such defect applies *independently* to the arbitration clause itself. If the arbitration clause *itself* is alleged to be fraudulently induced, and hence merely voidable, that issue would still be for the courts rather than an arbitrator. *Prima Paint*, 388 U.S. 403-04. Such a claim applies independently to the arbitration clause and is not diminished by any unrelated distinctions between claims of voidness or voidability. Likewise, where a particular claim does *not* independently apply to the arbitration clause, its effect is not strengthened by its involving voidness rather than voidability. In this case, because an alleged violation of the usury laws is based exclusively on the separate substantive provisions of the underlying contract, and has no *independent* application to the arbitration clause itself, it cannot have any effect on the separable agreement to arbitrate regardless of its effect on the remainder of the contract.

II. EXPANSIVE AND CERTAIN ENFORCEMENT OF ARBITRATION AGREEMENTS FURTHERS THE VALUABLE AND ESTABLISHED PURPOSES OF THE FAA.

The erroneous approach of the Florida Supreme Court is particularly troubling because of the extensive impact such an approach would have on arbitration and the ensuing damage it would cause to federal policy favoring arbitration. Arbitration agreements appear in a wide variety of contracts in the banking and other industries. Those underlying contracts are often the target of claims of illegality having nothing to do with the arbitration clauses themselves but that, under the decision below, would effectively nullify numerous agreements to arbitrate.

A. The Decision Below Would Exclude a Broad Swath of Claims from Arbitration.

As this Court is certainly well aware, arbitration clauses appear in an extensive array of contracts involving a myriad of goods and services. In the banking industry, in particular, arbitration clauses are an often used and often litigated element of contracts. *See, e.g.*, *Green Tree Financial Corp.* v. *Bazzle*, 539 U.S. 444, 447 (2003) (home improvement loan agreement); *Citizens Bank* v. *Alafabco, Inc.*, 539 U.S. 52, 53 (2003) (commercial construction debt restructuring agreement); *Green Tree Financial Corp.-Alabama* v. *Randolph*, 531 U.S. 79, 82 (2000) (mobile home financing and insurance agreement).

Arbitration clauses appear in savings and checking account agreements, home loan agreements, auto loan agreements, personal loan agreements, credit card agreements, and various ancillary investment and other agreements entered into between banks and consumers. In one study of consumer-initiated arbitration, for example, 90% of the arbitrations reviewed were related to consumer lending in one form or another, and of those arbitrations, 75.2% were related to the banking industry, including claims regarding insurance linked to credit cards, savings and checking account transaction disputes, disputes over credit card charges, interest rates and payments, mortgage lending disputes, and other claims involving financial services. Ernst & Young, *Outcomes of Arbitration: An Empirical Study of Consumer Lending Cases* 7-8 (2004).[5] Arbitration agreements likewise appear in numerous other commercial contexts, as will no doubt be discussed by other *amici*.[6]

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[5] Available at http://www.ey.com/global/download.nsf/US/-Outcomes_of_Arbitration/$file/OutcomesofArbitrationAnEmpirical-Study.pdf.

[6] While the U.S. Chamber of Commerce is in a better position to discuss the use of arbitration clauses in the non-banking context, a few examples will suffice here to illustrate the widespread use of arbitration clauses throughout the economy. *See, e.g.*, *Circuit City Stores, Inc.* v. *Adams*, 532 U.S. 105, 109 (2001) (employment agreement); *Wright* v. *Universal Maritime Service Corp.*, 525 U.S. 70, 72 (1998) (longshoremen's collective bargaining agreement); *Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 54 (1995) (securities brokerage account agreement); *Allied-Bruce Terminix Companies, Inc.* v. *Dobson*, 513 U.S. 265, 268 (1995) (termite control contract); *Gilmer* v. *Interstate/Johnson Lane Corp.*, 500 U.S. 20 (1991) (registered securities representative registration/employment agreement); *Volt Information Sciences, Inc.* v. *Board of Trustees of Leland Stanford Junior University*, 489 U.S. 468, 470 (1989) (construction contract); *Mitsubishi Motors*, 473 U.S. at 616-17 (automobile manufacturer distribution and sales agreement); *General Atomic Co.* v. *Felter*, 436 U.S. 493, 494 (1978) (uranium supply agreement); *Prima Paint*, 388 U.S. 395 (paint manufacturing and sales consulting agreement).

Given the frequent and widespread use of arbitration clauses, it should come as no surprise that the specific issue raised by the petitioner likewise arises in numerous cases. Contracts containing arbitration clauses are frequently subject to claims that the underlying contract is illegal for some alleged substantive conflict with law or public policy that has nothing to do with the arbitration clause itself.

While many of the cases emphasized by petitioner involve the particular field of pay-day lending, claims of voidness arise frequently in other banking contexts as well. *See, e.g.*, *Branco* v. *Norwest Bank Minnesoa, N.A.*, -- F. Supp.2d --, 2005 WL 1866086, at *2 (D. Hawaii 2005) (challenging arbitration agreement by claiming, *inter alia*, that underlying loan agreement was void *ab initio* because it was formed in violation of consumer protection statutes); *Gipson* v. *Cross Country Bank*, 354 F. Supp.2d 1278, 1280 (M.D. Ala. 2005) (alleging credit card agreement to be void *ab initio* because it allowed bank to unilaterally change provisions); *Anderson* v. *Delta Funding Corp.*, 316 F. Supp.2d 554, 562 (N.D. Ohio 2004) (attempt to avoid arbitration clause by alleging that mortgage transaction was void *ab initio* based on supposed violations of Truth in Lending Act); *Taylor* v. *Citibank USA,*

N.A., 292 F. Supp.2d 1333, 1339 (M.D. Ala. 2003) (attempting to avoid arbitration by claiming credit card agreement was void *ab initio* because of alleged violation of Fair Credit Billing Act); *Stewart* v. *Favors*, 590 S.E.2d 186, 189 (Ga. App. 2003) (challenging arbitration provisions in a consumer loan transaction based, *inter alia*, on claim that loan transactions were void because part of illegal predatory lending scheme); *Earls* v. *Chase Bank of Texas, N.A.*, 59 P.3d 364, 365 (Mont. 2002) (challenge to a deed of trust as void *ab initio* based on alleged failure to follow certain statutory notice requirements in mortgage context).[7] The above are a mere sampling of banking cases showing that the issue of arbitrability of allegedly void contracts occurs in disputes far beyond the particular context of pay-day lending. Rather, the issue affects the entire banking industry in numerous contexts. The impact of the erroneous approach adopted by the Florida Supreme Court thus would be widespread and would substantially undermine the policy goals of the FAA.

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[7] In the non-banking context, there is an even greater variety of claims of substantive voidness, and the impact on arbitration clauses would be extensive. *See, e.g.*, *John B. Goodman Ltd. Partnership* v. *THF Constr., Inc.*, 321 F.3d 1094, 1096-97 (CA11 2003) (voidness of construction contract alleged based on performance by an unlicensed contractor); *Silver Dollar City, Inc.* v. *Kitsmiller Constr. Co.*, 874 S.W.2d 526, 536 (Mo. Ct. App. 1994) (alleged voidness or revocability of entire construction contract); *Mesa Operating Ltd. Partnership* v. *Louisiana Intrastate Gas Corp.*, 797 F.2d 238, 244 (CA5 1986) (voidness alleged based on violation of state regulations for sale of certain gas); *Nature's 10 Jewelers* v. *Gunderson*, 648 N.W.2d 804, 805 (S.D. 2002) (voidness based on violation of franchise law); *Fazio*, 340 F.3d at 394-95 (voidness of brokerage account agreement based on alleged criminal embezzlement and fraud); *National R.R. Passenger Corp.*, 892 F.2d at 1070-71 (alleged voidness of indemnification agreement due to conflict with public policy regarding accountability for illegal acts causing injury); *R.P.T. of Aspen, Inc.* v. *Innovative Communications, Inc.*, 917 P.2d 340, 342 (Colo. Ct. App. 1996) (alleged voidness of telecommunications sales and marketing agreement based on violation of antitrust laws).

B. The FAA Sensibly Establishes a National Policy Favoring Expansive Enforcement of Arbitration Agreements.

The FAA sets forth a national policy favoring and protecting the use of voluntary arbitration agreements as an alternative form of dispute resolution. This Court has recognized "the unmistakably clear congressional purpose that the arbitration procedure, when selected by the parties to a contract, be speedy and not subject to delay and obstruction in the courts." *Prima Paint*, 388 U.S. at 404; *see also Mastrobuono* v. *Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 56 (1995) (FAA "not only 'declared a national policy favoring arbitration,' but actually 'withdrew the power of the states to require a judicial forum for resolution of claims which the contracting parties agreed to resolve by arbitration'") (citation omitted); *Shearson/American Exp., Inc.* v. *McMahon*, 482 U.S. 220, 226 (1987) (FAA "establishes a 'federal policy favoring arbitration,' * * * requiring that 'we rigorously enforce agreements to arbitrate * * * '") (citations omitted); *Peoples Sec. Life Ins. Co.* v. *Monumental Life Ins. Co.*, 867 F.2d 809, 813 (CA4 1989) ("the policies of the Act should be effectuated whenever possible, and federal courts should 'rigorously enforce agreements to arbitrate.'") (citation omitted).

That national policy is based on the well-founded congressional view that arbitration is a cost effective, speedy, and reliable alternative to litigation in the courts, which are often crowded, inefficient, time-consuming, and expensive.

In the banking industry in particular, Congress's policy judgment has proved to be entirely accurate, both from the business and consumer perspectives. Indeed, the Ernst & Young study found that arbitration in the consumer lending context had recognized advantages over litigation in connection with outcomes, process, costs, and timeliness. Ernst & Young, *Outcomes of Arbitration*, at 2. The study further found that consumers prevailed more often than businesses in cases that went to an arbitration hearing, consumers prevailed

close to 80% of the time when pre-hearing settlements were taken into account, and that nearly 70% of the consumers surveyed were either satisfied or very satisfied with the arbitration process. *Id.* at 7-8.

By shifting the resolution of claims of substantive illegality to the courts and away from arbitrators, the decision below renders arbitration clauses effectively meaningless in such cases. Even where a court ultimately rejects the claim of illegality, that issue will often have been the primary or sole issue in the case and a subsequent order to arbitrate will either be pointless or worse.[8] Claims of substantive illegality could readily be made to an arbitrator and there is no reason to think that arbitrators would be incapable of resolving such claims fairly and expeditiously.

Precluding the arbitration of claims of voidness is doubly problematic in that it not only undermines the use of arbitration, but is done out of an open distrust of the arbitration process itself. Such animus towards arbitration is in direct conflict with the policy of the FAA.

The court below, for example, claimed that it was unwilling to allow an arbitrator to decide the issue of illegality because "Florida public policy and contract law prohibit breathing life into a potentially illegal contract." Pet. App. 7a. But treating arbitration agreements as separate and severable contracts would not "breathe life" into the potentially offending remainder of the agreement – not unless you improperly presumed that arbitrators would systematically reach the *wrong* result and tend to uphold illegal contracts. In fact, the concurrence below is quite explicit in such improper disparagement of the arbitration process. Pet. App. 11a (Bell, J., specially concurring) ("The state's regulatory authority in the consumer protection area could be severely weakened if predatory lenders are allowed to circumvent the state courts and direct to arbitration claims that their lending practices violate state law."). The notion that state consumer protection will suffer from arbitration necessarily depends on the improperly hostile predicate that arbitrators are either biased or incompetent to decide such issues and will improperly rule against consumers.

[8] Should an unsuccessful litigant seek to reassert the alleged illegality before an arbitrator and deny that the prior resolution by the court is binding on the ultimate merits, the defending party will, at a minimum, be forced into the further expense of arbitrating the issues of *res judicata* or law-of-the-case and, if somehow unsuccessful on those issues, could be forced to re-litigate the substantive claim itself. Such a duplication of effort undermines the very purpose of arbitration clauses and the very value that Congress saw in arbitration when enacting the FAA.

Arbitration, however, is presumptively neutral toward state consumer protection and will produce results for or against the consumer depending on the specific merits of each case. (If anything, arbitration seems to be a *more favorable* forum for consumers than the courts themselves, particularly in the consumer lending context. *See supra*, at 15-16.) If the arbitrator agrees that the contract is illegal, he would rule accordingly and deny the illegal contract any effect. Allowing an arbitrator to reach that decision gives no effect to the illegal underlying contract, but rather properly treats it as severable from the arbitration agreement itself. It is only in the limited scenario where the arbitrator erroneously upholds an illegal contract that Florida public policy is even remotely at risk. But in such circumstances, there are other means of vindicating state policy. For example, the resulting arbitral decision could be challenged in court on the grounds that it requires the performance of some illegal act. *National R.R. Passenger Corp.*, 892 F.2d at 1071.

Florida's unwillingness to allow the arbitrator to make the decision in the first instance thus reflects a wholly unwarranted distrust of the arbitration process and the assumption that arbitrators will reach the wrong results and somehow skew disproportionately against Florida public policy. Not only is that assumption simply wrong as a factual matter (and unsupported by anything in the Florida Supreme Court's

opinion), it is also an impermissible basis for avoiding arbitration as a matter of federal law regardless of how state public policy might fare on average in arbitration. *Mitsubishi Motors*, 473 U.S. at 626-27 ("we are well past the time when judicial suspicion of the desirability of arbitration and of the competence of arbitral tribunals" can prevent enforcement of the FAA as applied to claims alleging statutory violations); *Fletcher* v. *Kidder, Peabody & Co., Inc.*, 619 N.E.2d 998, 1006 (N.Y.) ("there is nothing in the present body of Federal law that supports carving out a special 'public policy' exception from the general rule of arbitrability mandated by the FAA"), *cert. denied*, 510 U.S. 993 (1993).

The strong federal policy in favor of expansive and rigorous enforcement of arbitration agreements militates against any attempt to undermine their effectiveness through indirect assaults on their validity. The separability doctrine not only represents the correct and sensible interpretation of the FAA and an efficient judicial approach to frequently arising questions, it also furthers the underlying policy goals of the FAA by protecting arbitration agreements from unrelated challenges to their validity and the seeming hostility of some courts.

CONCLUSION

For the foregoing reasons, the judgment of the Florida Supreme Court should be reversed.

Respectfully Submitted,

ERIK S. JAFFE
Counsel of Record
ERIK S. JAFFE, P.C.
5101 34th Street, N.W.
Washington, D.C. 20008
(202) 237-8165

Counsel for Amici Curiae

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